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IN THE

Supreme Court of the United States

October Term 1974

No. 73-2060

CARL M. AUSTIN et al., Appellants,

v.

STATE OF NEW HAMPSHIRE et al., Appellees.

On Appeal from the Supreme
Court of the State of New Hampshire

BRIEF FOR THE APPELLANTS

Charles W. Smith, Esq.
199 Main Street
Saco, Maine 04072
Counsel for the Appellants

November 15, 1974

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OPINION BELOW

The opinion of the Supreme Court of the State of New Hampshire is reported in 316 A. 2d 165 as *Carl M. Austin et al. v. State Tax Commission*, Merrimack No. 6641.

JURISDICTION

The judgment of the Supreme Court of the State of New Hampshire was entered February 28, 1974 (App. p. 2). The notice of appeal to this court was filed in the Supreme Court of the State of New Hampshire on May 13, 1974 (App. p. 2). On May 20, 1974, by order of Mr. Justice Brennan, the time for docketing the appeal was extended to and included July 29, 1974. The appeal was docketed on July 22, 1974. On October 15, 1974 this Court entered the following order: "In this case probable jurisdiction is noted." The jurisdiction of this Court rests on 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Privileges and Immunities Clause of Article IV §2 of the United States Constitution?

2. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATUTE INVOLVED

Ch. 77-B of the New Hampshire Revised Statutes Annotated,[1] known as the New Hampshire Commuters

[1] Amendments to Ch. 77-B of the New Hampshire Revised Statutes Annotated not affecting the substantial questions presented to this Court were enacted by C. 528 of the 1973 Public Laws of New Hampshire, effective October 31, 1973 and C. 544 of the 1973 Public Laws of New Hampshire, effective September 1, 1973. See the 1973 Cumulative Supplement to Vol. 1-A of the New Hampshire Revised Statutes Annotated, pp. 107-108.

Income Tax, is the New Hampshire statute construed by the Supreme Court of New Hampshire as not violative of the privileges and immunities and equal protection clauses of the United States Constitution. Ch. 77-B of the New Hampshire Revised Statutes is the statute involved in this case and is set forth in the appendix to the brief (statutory appendix pp. 20-33). Section 2 of Ch. 77-B is the provision of the New Hampshire Commuters Income Tax imposing the tax and reads as follows:

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

STATEMENT

Appellants are residents of the State of Maine who during the taxable year 1970 earned income in the State of New Hampshire. A tax was imposed by the State of New Hampshire on the appellants' income earned in New Hampshire under the authority of the N.H. RSA, Ch. 77-B:2 II (statutory appendix p. 22). The tax imposed in 1970 was withheld from appellants' wages by their employers pursuant to the N.H. RSA Ch. 77-B:10 (statutory appendix p. 26).

Appellants paid the tax imposed by the State of New Hampshire and received a credit from the State of Maine for the New Hampshire tax paid. The State of Maine imposed a tax on the entire taxable income of residents and the income of nonresidents derived from sources within Maine. 36 M.R.S.A. §5111 (statutory appendix p. 33). The State of Maine gives a credit to residents for taxes paid other jurisdictions. 36 M.R.S.A. §5127 (statutory appendix p. 34).

Appellants brought a petition for declaratory judgment on behalf of themselves and other taxpayers similarly situated before the New Hampshire Superior Court for Merrimack County, challenging the constitutionality of the New Hampshire Commuters Income Tax under the Constitution of the United States and the Constitution of the State of New Hampshire. The appellees brought a motion to dismiss, which was denied. Exceptions were noted by the Superior Court and all issues were transferred to the New Hampshire Supreme Court (App. p. 5).

The New Hampshire Supreme Court held the appellants had standing to challenge the tax imposed. *Austin et al, v. State Tax Commission*, 316 A. 2d 165, 166.

The Court went on to hold the tax imposed was "not violative of the privileges and immunity clause or the equal protective [sic] clause of the Federal Constitution or of the State Constitution." *Id.* at 167, 168.

SUMMARY OF ARGUMENT

The New Hampshire Commuters Income Tax Law, N.H. RSA Ch. 77-B, imposes a tax on Maine residents and other nonresidents of New Hampshire on income earned in New Hampshire. The amount of tax paid by a nonresident is dependent in part on the taxing structure of his state of residence.

The New Hampshire Commuters Income Tax Law does not impose a tax on New Hampshire residents on income earned in New Hampshire. The statute purports to tax income of New Hampshire residents earned in other jurisdictions. No tax is ever paid, under this statute, by a New Hampshire resident to the State of New Hampshire on income earned in other jurisdictions.

This statute, imposing a tax on Maine residents and other nonresidents of New Hampshire, denies to them a privilege and immunity granted to citizens of all states by Article IV, Section 2 of the United States Constitution and equal protection of the laws granted to all persons within a state's jurisdiction by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The privileges and immunities clause precludes the imposition of higher taxes upon citizens of other states than the taxes imposed by the taxing state upon its own citizens. The equal protection clause denies a state the power to legislate so that different treatment is accorded to persons placed by statute into different classes on the basis of criteria not related to the objective of the statute.

ARGUMENT

I

THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV SECTION 2 OF THE UNITED STATES CONSTITUTION IS VIOLATED BY THE NEW HAMPSHIRE COMMUTERS INCOME TAX LAW FOR THAT STATUTE FAILS TO IMPOSE A TAX ON NEW HAMPSHIRE RESIDENTS ON THEIR NEW HAMPSHIRE DERIVED INCOME WHILE IMPOSING A TAX ON NONRESIDENTS OF NEW HAMPSHIRE ON THEIR NEW HAMPSHIRE DERIVED INCOME.

The purpose of the privileges and immunities clause of Article IV Section 2 of the United States Constitution is well stated by former Chief Justice Vinson.

> "The primary purpose . . . was to fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

Among the privileges and immunities granted to a citizen who passes into another State is the privilege and immunity,

> ". . . to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 420 (1870).

Tax liability under the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, depends on whether or not one is a resident of the State of New Hampshire. If one is a resident of New Hampshire he will never pay a tax under the provisions of the New Hampshire Commuters Income Tax. The statute contains no provision for a tax on income earned in New Hampshire by New Hampshire residents.

The New Hampshire Commuters Income Tax does purport to levy a tax on the New Hampshire resident on income derived outside of New Hampshire as follows:

> "A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 'New Hampshire taxable income;' provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph." RSA 77-B:2 I.

Effectively a New Hampshire resident never pays a tax to the State of New Hampshire under 77-B:2 I. If the jurisdiction in which the New Hampshire resident earns income does not impose a tax on such income, the income is specifically exempted from tax by the express provision of 77-B:2 I. If the New Hampshire resident is subject to a tax levied by another state on income derived in that state by the New Hampshire resident, the payment of the tax to the other state by the New Hampshire resident is full satisfaction of the tax imposed by New Hampshire on its resident pursuant to 77-B:2 I. It is submitted that there is no real imposition of a tax by the State of New Hampshire on its residents under 77-B:2 I.

Should one conclude that New Hampshire residents are taxed by New Hampshire under N.H. RSA 77-B:2 I even though payment is never made to the State of

New Hampshire, the amount of tax would vary depending on the tax structure of the jurisdiction from which the New Hampshire resident derived income. Thus, even as between New Hampshire residents there is discrimination if one accepts the premise that a tax is effectively levied on New Hampshire residents.

The portion of the New Hampshire Commuters Income Tax Law that imposes the tax on nonresidents reads as follows:

> "A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state." N.H. RSA 77-B:2 II.

An analysis of this statutory provision reveals that New Hampshire imposes a four percent tax on New Hampshire derived income of nonresidents after an exemption of two thousand dollars. The four percent rate applies, however, only if the tax imposed "exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state..." 77-B:2 II. When this occurs, "the tax... imposed shall be reduced to equal the tax which would be imposed by such other state." 77-B:2 II. Thus, the taxing structure of the nonresident's state of residence determines the effective New Hampshire tax. Under the language of the New Hampshire statute as written, when there is no income tax in the nonresident's state of residence, the effective tax is at the maximum rate of four percent of the New

Hampshire derived income less the two thousand dollar exemption. When, however, the nonresident's state of residence imposes a lesser tax on income derived in that state, the tax imposed by New Hampshire is reduced to equal the tax which would have been imposed by the nonresident's state of residence if the nonresident had earned the income in his state of residence. As a practical matter it would appear from the New Hampshire Income Tax Form at line six (App. p. 6), that no tax is imposed on a nonresident residing in a jurisdiction without an income tax.

In contrast to the New Hampshire resident working in New Hampshire who never pays a tax, a Maine resident or a resident of Massachusetts or Vermont or any other nonresident of New Hampshire working alongside the New Hampshire resident, with the same earnings, marital status and number of dependents would pay the tax imposed by N.H. RSA 77-B:2 II. Even as among the residents of Maine, Massachusetts and Vermont and other nonresidents of New Hampshire with the same earnings, marital status and number of dependents, the tax imposed by N.H. RSA 77-B:2 II can differ in amount and is discriminatory.

Using rationale from *Shaffer v. Carter*, 252 U.S. 37, 55, 56, the New Hampshire Supreme Court, in the opinion below, determined that it

> "... will weigh the commuters income tax in terms of its practical effect and operation. citations omitted" *Carl M. Austin et al. v. State Tax Commission*, 316 A. 2d 165, 167 (1974).

The Maine taxpayers are in complete agreement with the New Hampshire Supreme Court's expressed desire to weigh the tax in terms of its practical effect and operation. There is no showing, however, that the tax structure of the State of New Hampshire is such that there is practical equality between residents and

nonresidents nor, appellants submit, can the State of New Hampshire show such practical equality. Lack of discrimination against nonresidents cannot be assumed. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 81 (1920). Validity of a tax cannot be established by its mere imposition. *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). This court consistently gives a narrow scope of operation to the presumption of constitutionality when legislation appears on its face to violate a specific prohibition of the constitution. *Ex Parte Endo*, 323 U.S. 283, 299 (1944).

The New Hampshire Supreme Court states in the opinion below that:

> "A resident pays an unearned income tax, a ten dollar residence tax, and other taxes while a nonresident pays nothing for the state services which protects him and his employment unless by means of this tax which operates to produce a 'practical equality' by means of the power 'to equitably defray the expense of protecting the right of property and other rights.'" *Carl M. Austin et al. v. State Tax Commission*, 316, A. 2d 165, 167 (1974).

A New Hampshire resident does pay a ten dollar resident tax, N.H. RSA 72:1 (statutory appendix p. 35), which is a flat annual charge, and is retained for the use of the town and city in which collected. N.H. RSA 72:5-a (Supp.-1973) (statutory appendix p. 35). The other named tax indicated in the opinion below to apply to residents and not nonresidents is the unearned income tax. This unearned income tax N.H. RSA 77:1 (statutory appendix p. 35) applies to interest and dividends of resident individuals and not to nonresident individuals, N.H. RSA 77:3-4 (statutory appendix pp. 35, 36), and under its terms, six hundred dollars of income otherwise taxable is exempt. N.H. RSA 77:5 (statutory appendix p. 36). No other taxes imposed

by New Hampshire are specifically named by the New Hampshire Supreme Court to apply to residents and not to nonresidents; nor have the Maine taxpayers found any other such taxes. There are, however, taxes imposed by the State of New Hampshire such as the business profits tax, the real estate transfer tax, the tobacco tax and taxes on real and personal property, which apply to nonresidents as well as residents. The Maine taxpayers submit that a ten dollar annual fee, returnable to the use of cities and towns and a four and one quarter percent tax on unearned income with a six hundred dollar annual exemption is not practically equivalent to a tax on their earnings.

Even if one could conclude that the taxes on certain nonresident taxpayers were practically equivalent to taxes on New Hampshire residents, there would be discrimination by the State of New Hampshire among the nonresident taxpayers unless taxes among nonresident taxpayers from different states were levied at the same rate. N.H. RSA 77-B:2 II clearly indicates that the tax structure of the nonresident's state of residence can dictate the amount of tax paid to the State of New Hampshire. Uniformity in the tax structures of all tax jurisdictions does not exist.

The practical operation of the New Hampshire Commuters Income Tax Law is not to tax residents of New Hampshire but to impose a tax on nonresidents earning income in New Hampshire. The amount of tax paid by nonresidents with the same earnings, marital status and dependents often varies because of the tax structure of the nonresident's state of residence. In *Toomer v. Witsell*, 342 U.S. 385 (1948), the State of South Carolina attempted to impose higher license taxes on nonresidents who caught shrimp off the coast of South Carolina than that imposed upon South Carolina shrimp fishermen. The Court held that the South Carolina statute violated Article IV §2 of the United States Constitution (the privileges and immunities clause). In addition, the South Carolina statute was also

held to be in violation of the commerce clause Art. 1 §8 of the United States Constitution. The *Toomer* case differs from the instant case in that the South Carolina statute held to be unconstitutional did impose a license tax upon its own residents albeit one hundred times less than the license tax upon the nonresidents. Of like import is *Mullaney v. Anderson*, 342 U.S. 415 (1952), where a statute enacted by the Territorial Legislature of Alaska imposing a five dollar license fee on resident fishermen and a fifty dollar license fee on nonresident fishermen was held to be in violation of the Privileges and Immunities Clause of Article IV, §2 of the United States Constitution. The New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, imposes no tax on New Hampshire residents deriving income in New Hampshire while imposing a tax of four percent of New Hampshire derived income with certain limitations upon nonresidents.

The United States Supreme Court invalidated those portions of the general income tax law of the State of New York which permitted residents greater personal exemptions than those granted nonresidents. Justice Pitney speaking for the court said:

> "In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which States has an income tax law. A considerable number of complainant's employees, residents and citizens of one or the other of those States, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity due to the geographical situation of that city, in close proximity to the neighboring States, many thousands of men and women, residents and citizens of those States, go daily from their homes to the city and earn their livelihood there. They pursue their several occupa-

tions side by side with residents of the State of New York — in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first one thousand or two thousand dollars of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see *Amoskeag Savings Bank v. Purdy*, 231 U.S. 373, 393-394; *Maxwell v. Bugbee*, 250 U.S. 525, 543); but a general rule, operating to the disadvantage of all nonresidents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 80-81 (1920).

The instant case differs from the *Travis* case in that in the case before this court no income tax is levied upon New Hampshire residents working in New Hampshire while in the *Travis* case an income tax was levied upon residents of the State of New York. However, the rationale of the *Travis* case as to violation of privileges and immunities of nonresidents applies to the instant case. Also see *State ex rel. Haworth v. Berntsen et ux.*, 200 P. 2d 1007 (Idaho 1948). For in both the *Travis* case and this case a discrimination against nonresidents exists. In the instant case the Maine residents contend the discrimination is even more severe in that no tax is levied upon New Hampshire residents working in New Hampshire.

II

THE NEW HAMPSHIRE COMMUTERS INCOME TAX LAW VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS THAT STATUTE ESTABLISHES A CLASSIFICATION FOR TAX PURPOSES WHICH INVIDIOUSLY DISCRIMINATES AGAINST ALL NEW HAMPSHIRE NONRESIDENTS DERIVING INCOME IN NEW HAMPSHIRE.

States may treat different classes of persons in different ways without violating the Equal Protection Clause of the Fourteenth Amendment of the United States. *Reed v. Reed*, 404 U.S. 71, 75 (1971). This power to classify is of wide range and flexibility. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37 (1928). Nevertheless a tax which results in arbitrary discrimination in classification denies the equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution, for the United States Supreme Court has stated:

> "...the classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1919).

Mr. Justice Douglas has indicated a limitation on the prohibition of the Equal Protection Clause as going "...no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

In determining whether a classification is so arbitrary as to result in invidious discrimination, a class must be found upon which the discrimination is practiced. There are many classes which have been dis-

criminated against in violation of the Equal Protection Clause of the Fourteenth Amendment. Among the classes which have been found to have been discriminated against in violation of the Equal Protection Clause are the following: the criminal insane, *Baxstrom v. Herold*, 383 U.S. 107 (1966); voters, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); prisoners, *Rinaldi v. Yeager*, 384 U.S. 305 (1966); needy persons, *Shapiro v. Thompson*, 394 U.S. 618 (1969); women, *Reed v. Reed*, 404 U.S. 71 (1971); unmarried persons, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); illegitimate children, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); indigent defendants, *James v. Strange*, 407 U.S. 128 (1972); primary voters, *Kusper v. Pontikes*, 414 U.S. 51 (1973).

Under the New Hampshire Commuters Income Tax Law, N.H. RSA 77-B:2 II, nonresidents of New Hampshire are subject to a tax on their New Hampshire derived income while residents of New Hampshire are not subject to a tax on their New Hampshire derived income. Discrimination against nonresident property taxpayers has been held to be in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Bivens et al. v. Board of Com'rs of Wabaunsee County, Kansas*, 66 F. 2d 35 (1933).

Even among nonresidents as a class, there are subclasses composed of residents from each state deriving income from New Hampshire. For example, Massachusetts, Vermont and Maine residents deriving income from New Hampshire would each be a separate subclass. The amount of tax that a member of each of these subclasses of nonresidents would pay under the provisions of the New Hampshire Commuters Income Tax Law to the State of New Hampshire is dependent in part on the tax structures of Massachusetts, Vermont and Maine. This is so because the New Hampshire Commuters Income Tax Law provides:

> "A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in R.S.A. 77-B:1 less an exemption of two thousand dollars; **provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.**" N.H. RSA 77-B:2 II (emphasis supplied).

The tax structures of the several states whose residents work in New Hampshire are not identical. Therefore, the amount of tax paid to New Hampshire by New Hampshire nonresidents from different states, can and often does vary even though they may earn the same amount of New Hampshire derived income and have the same number of dependents and the same marital status.

The legislative object of the New Hampshire Commuters Income Tax Law is to raise revenue to fund New Hampshire's services. The law provides that, "The revenue received from this chapter after paying the expense of administering this chapter shall be paid into the general fund." N.H. RSA 77-B:24. The classifications created by the New Hampshire Commuters Income Tax Law do not rest upon a ground of difference having a substantial relation to the object of the legislation. The Maine taxpayers submit that the New Hampshire Commuters Income Tax Law results in invidious discrimination against nonresidents of New Hampshire subject to that statute. A fundamental principle involved in classification is that it must meet the requirement that a law shall affect alike all persons in the same class and under similar conditions. *Duncan v. Missouri*, 152 U.S. 377, 382 (1893).

The judgment of a California Superior Court striking down an ordinance of the city and county of San Francisco that imposed a fee of one percent of adjusted gross income of all persons who were employed in the city and county but who resided elsewhere, was affirmed by the Court of Appeals of California, First District. *County of Alameda et al. v. City and County of San Francisco*, 19 Cal. App. 3d 750, 97 Cal. Rptr. 175, 48 ALR 3d, 332. The California Court of Appeals held, inter alia, that although a city might have justification for allocating certain costs to nonresidents, "... the city may not accomplish this end by imposing a tax solely upon nonresidents engaged in a particular activity while totally exempting residents engaged in the same activity." *Id.* at 341. The California Court of Appeals in concluding that the ordinance denied equal protection of the law to the nonresidents commented, "aside from its constitutional infirmities, the San Francisco ordinance is by its very nature likely to court a situation where retaliatory measures are enacted by neighboring cities and the state is divided into numerous warring economic units, all to the disadvantage of the individual citizen." *Id.* at 341.

The New Hampshire Commuters Income Tax Law does create an atmosphere whereby neighboring states could think in terms of retaliatory measures against New Hampshire residents. The United States Supreme Court has clearly indicated that discrimination is not to "... be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920). The Maine taxpayers urge this court to eliminate any possibility of retaliation measures by declaring the New Hampshire Commuters Income Tax Law provision imposing a tax on them to be in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III

MAINE RESIDENTS DERIVING INCOME IN NEW HAMPSHIRE AND PAYING A TAX TO THE STATE OF NEW HAMPSHIRE PURSUANT TO THE PROVISIONS OF THE NEW HAMPSHIRE COMMUTERS INCOME TAX LAW ARE INJURED IN FACT BY THE IMPOSITION AND PAYMENT OF THAT TAX.

Although Maine residents deriving income in New Hampshire, are not immediately paying out more tax dollars, they are injured in fact. Taxpayers have standing to pursue a constitutional claim of denial of equal protection of the law. *Allied Stores of Ohio, Inc. v. Bowers, Tax Commissioner of Ohio*, 358 U.S. 522, 526 (1959). It is true the Maine residents receive a credit from the State of Maine for Commuters Income Tax paid the State of New Hampshire (statutory appendix p. 34), but appellants strenuously disagree with the following statement of the New Hampshire Supreme Court:

> "Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they would otherwise pay to Maine, they are not prejudiced by the Commuters Income Tax." *Austin et al. v. State Tax Commission*, 316 A. 2d 165, 167 (1974).

The services provided by the State of New Hampshire to nonresidents and residents for which nonresidents are paying tax dollars under N.H. RSA Ch. 77-B, are not being paid for on a proportional basis by residents under N.H. RSA Ch. 77-B. In fact no tax dollars are being paid under N.H. RSA Ch. 77-B by New Hampshire residents to provide these services. If New Hampshire residents were taxed on New Hampshire derived income under N.H. RSA Ch. 77-B at the same rate as Maine residents, there would be more tax dollars to provide additional services in New Hampshire

to residents and nonresidents. On the other hand, if services paid for by taxes under N.H. RSA Ch. 77-B were to remain at the same level and the residents shared the tax burden with appellants under N.H. RSA Ch. 77-B, the appellants would be paying a lower tax. Appellants are injured as residents of New Hampshire are not sharing the tax burden under N.H. RSA Ch. 77-B.

Maine residents do not object to paying tax dollars to the State of New Hampshire provided New Hampshire residents pay tax dollars on the same basis. However, when tax dollars are not paid on the same basis by residents and nonresidents, as in the instant case, the Maine residents are suffering a very real injury. Tax dollars are being collected and diverted from the appellants' domiciliary state under a law which violates the privileges and immunities clause of the United States Constitution as well as the equal protection clause.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

November 15, 1974

CHARLES W. SMITH
Counsel for the Appellants

STATUTORY APPENDIX

NEW HAMPSHIRE

RSA

Chapter 77-B

(as enacted by Chapter 20, Laws of 1970 and amended by Chapter 57, Laws of 1970)

Commuters Income Tax

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise:

I. "Adjusted gross income" shall mean, for any taxable year, the adjusted gross income as defined in the United States internal revenue code in effect for that taxable year but excluding income which under the code is exempted from taxation by the state.

II. "Commission" shall mean the state tax commission.

III. "Estimated tax" shall mean the amount which the individual estimates as the amount of the income tax imposed by this chapter for the taxable year, minus the amount which the individual estimates as the sum of any credits against such tax.

IV. "Taxpayer" shall mean any person subject to the provisions of this chapter.

V. "Individual" shall mean a natural person.

VI. "New Hampshire taxable income" shall mean, for any taxable year, taxable income as defined under the United States internal revenue code in effect for that taxable year less any New Hampshire derived income, less an exemption of two thousand dollars and less any taxable business profits taxed pursuant to the business profits tax.

VII. "Person" shall mean any individual.

VIII. "Taxable year" shall mean the calendar or fiscal year, or portion thereof, upon the basis of which the New Hampshire tax is computed.

IX. "Taxable nonresident" shall mean any nonresident of the state whose adjusted gross income that taxable year includes any amount of New Hampshire derived income.

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

XI. "Resident" shall mean:

(a) an individual domiciled in the state except one who maintains a permanent place of abode outside the state, does not maintain one within the state and does not spend more than thirty days of the taxable year within the state; or

(b) an individual who maintains a permanent place of abode within the state and spends more than one

nundred eighty-three days of the taxable year within the state.

XII. For the purposes of this act, interest, dividends and capital gains received by the taxpayer from the ownership or sale of stock or from a beneficial interest in a trust and all income received by the taxpayer from a retirement system of any kind or from an annuity or other insurance plan shall be deemed to have been earned in the state of residence of said taxpayer.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

77-B:3 When Taxed. The tax imposed by RSA 77-B:2 shall be levied, collected, and paid by the fifteenth of the fourth month following the close of the taxable year.

77-B:4 Administration.

I. This chapter shall be administered and enforced by the business profits tax division of the tax commission subject to the supervision of the tax commission. The commission as authorized by governor and council, subject to personnel statutes, shall appoint such additional technical, clerical, and other personnel as the commission shall deem necessary to carry out the provisions of this chapter. The director of the business profits tax division shall have such powers, duties and functions in the enforcement of this chapter as the commission may from time to time assign. The director shall furnish a bond in an amount set under RSA 93.

II. Subject to the approval of the commission, the director may prescribe rules and regulations reasonably designed to carry into effect the intent and purpose of this chapter. These rules and regulations are prima facie evidence of its proper interpretations.

III. Subject to approval of the commission, the director is authorized to equip the division with furniture, equipment and supplies necessary to administer the division.

IV. The expenditures authorized by paragraphs I and III of this section shall be a charge against the moneys collected pursuant to this chapter, provided, however, that until such time as moneys received pursuant to this chapter equal the cost of administering

the same, the expenditures shall be a charge against the general fund. The governor is authorized to draw his warrants from the sums so authorized out of any money in the treasury not otherwise appropriated.

77-B:5 Credit for Taxes Withheld. Income upon which any tax is required to be withheld at its source under RSA 77-B:10-16 shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

77-B:6 Reciprocal Provisions. The commission is authorized to enter with any other state or country a reciprocal agreement in which such other state or country agrees not to impose a personal income tax upon income received by residents of this state and this state agrees not to impose a personal income tax upon income received by residents of such other state or country; provided, however, that such reciprocal agreement shall not become effective until the beginning of the next fiscal biennium after the date of such agreement.

Returns

77-B:7 Returns and Refunds of Individuals.

I. A taxpayer shall file a return of his net income for such a period and on such accounting basis as is authorized under the internal revenue code. For each taxable year, returns shall be made to the commission in such form and manner and to such extent as it shall prescribe by regulations, by the following taxpayers:

(a) A resident having for such taxable year any New Hampshire taxable income as defined in RSA 77-B:1; provided, however, that if it shall appear to the satisfaction of the commission that any residents of this state, or class of residents of this state, who are subject to the tax imposed by this act, are liable for tax upon the same income under the law imposed for

the taxable year by another state and are thereby entitled to a credit allowed by section 2 of this chapter against the tax otherwise due under this chapter, the commission shall by regulation relieve such residents or class of residents from being required to make any return under this chapter.

(b) A nonresident having for such taxable year New Hampshire derived income of two thousand dollars or more.

II. A husband and wife may make a single joint return to the commission for a taxable year for which such a return is filed under the laws of the United States. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

III. Whenever a taxpayer shall file a return which shows that his withholding tax or estimated tax exceeds the amount of tax liability due under this chapter, he shall be due a refund and the tax commission shall forthwith certify the amount of said refund to the state treasurer who shall pay the same to the taxpayer; provided, however, that at the option of the taxpayer, said refund may be credited against any tax due from said taxpayer for the succeeding calendar year.

IV. Any refund or credit due a taxpayer pursuant to paragraph III for which said refund or credit is not requested within five years shall be deemed the property of the state of New Hampshire.

77-B:8 Information Returns. Each individual, partnership, corporation, joint stock company or association or insurance company, being a resident or having a place of business in this state, in whatever capacity acting, including lessees or mortgagors of personal property, fiduciaries, employers and all officers and employees of the state or of any political sub-

division of the state, having the control, receipt, custody, disposal or payment of salaries, wages, rentals, or other compensation or income subject to the provisions of this chapter paid or payable during any year to any individual subject to a tax under this chapter shall on such date or dates as the commission shall from time to time designate, make complete return thereof to the commission.

77-B:9 Form and Verification of Returns. Returns shall be in such form as the commission may from time to time prescribe and shall be filed at any office which may be established on or before the fifteenth day of the fourth month following the close of the taxable year. In case of sickness, absence or other disability, or whenever good cause exists, the commission may allow further time for filing returns. Returns shall be verified by written declarations that the statements therein are made subject to the pains and penalties of perjury. When a return is made for a corporation or partnership, the person signing such return shall be deemed to be the person subject to the pains and penalties of perjury. The commission shall cause to be prepared blank forms for the returns and shall cause them to be distributed throughout the state and to be furnished upon application, but failure to receive or secure the form shall not relieve a taxpayer from the obligation of making the return herein required.

Withholding of Tax

77-B:10 Who Must Withhold. Every employer, as defined under the laws of the United States in effect April 26, 1947, with respect to income tax collected at its source, employing any person liable for a tax pursuant to the provisions of this chapter shall deduct and withhold upon wages paid to said employee, a tax equal to four percent of such wages subject to the provisions of RSA 77-B:13.

77-B:11 Return of Withheld Taxes. Every employer required to deduct and withhold any tax under RSA 77-B:10 shall make return thereof to the commission on or before February fifteenth in each year and shall pay quarterly the tax withheld to the commission, provided, however, that the commission may, if such action is necessary in any emergency where collection of the tax may be in jeopardy, require such employer to make such return and pay such tax at any time, or from time to time.

77-B:12 Employer's Liability. Every employer required to deduct and withhold a tax under RSA 77-B:10 is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this chapter.

77-B:13 Use of Withholding Tables. At the election of the employer with respect to such employee, the employer may deduct and withhold upon the wages paid to such employee a tax determined on the basis of tables to be prepared and furnished by the commission, which tax shall be substantially equivalent to the tax provided in RSA 77-B:10 and which shall be in lieu of the tax required in such section.

77-B:14 Amount of Withheld Taxes as Lien Against Employer. If any employer required to deduct and withhold a tax under RSA 77-B:10 neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of New Hampshire upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commission and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any

subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commission with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town or grant, in the office of the register of deeds for the county wherein such property is situated. In the case of any prior mortgage on real or personal property so written as to secure a present debt and also future advances by the mortgagee to the mortgagor, the lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage unless the commission also notifies the mortgagee of the recording of such lien in writing, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.

77-B:15 Release of Lien. The commission shall issue and record a certificate of release of the lien if:

I. The commission finds that the liability for the amount assessed and demanded, together with interest and costs, has been satisfied or has become unenforceable; or

II. There is furnished to the commission a bond with surety approved by the commission in a penal sum sufficient to equal the sum assessed and demanded, together with interest and costs, said bond to be conditioned upon the payment of any judgment rendered in proceedings regularly instituted by the commission to enforce collection thereof at law.

77-B:16 Foreclosure of Lien. The lien provided for by RSA 77-B:14 may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

Estimated Tax Declarations

77-B:17 Who Must File.

I. Individuals liable for the tax assessed under this chapter shall annually on the fifteenth of the fourth month following the close of the taxable year furnish the tax commission with an estimate of income subject to taxation under this chapter for the current taxable year from which no New Hampshire withholding tax is expected to be made if such income can reasonably be expected to exceed ten thousand dollars.

II. The filing of estimates shall not be applicable to persons receiving their income from farming as defined under the United States code.

77-B:18 Payment of Estimated Tax. Each taxpayer required to file an estimated tax declaration shall include with his declaration of estimated income payment of not less than one-quarter of the tax due thereon. Thereafter, on the fifteenth days of the sixth and ninth months following the close of the taxable year the taxpayer shall pay not less than one-quarter of the tax due upon said estimated income or any revised estimate thereof.

77-B:19 Payment of Fourth Installment — General Rule. Annually on the fifteenth day following the close of the taxable year for which the estimate of income was made, the taxpayer, whose income can reasonably be expected to exceed his estimated income by thirty percent or more shall file an amended declaration of estimated income on or before such date and make payment in full of the balance of the tax due thereon, or in lieu thereof may file a return for the taxable year for which the estimate was made and pay the tax in full as computed on the return on or before the last day of the first month following the close of said taxable year. Otherwise, the final quarterly payment may be made with the taxpayer's return on the

fifteenth day of the fourth month following the close of the taxable year for which the taxes were due.

77-B:20 — Exceptions. This requirement to amend or file a return shall not apply, however, if the taxpayer files a declaration of estimated income and makes payment of the tax due thereon as provided in this chapter, based upon:

I. The tax shown on the return by the taxpayer for the preceding taxable year, if a return showing a liability for tax was filed by the taxpayer for the preceding taxable year and such preceding year was a taxable year of twelve months, or

II. An amount equal to the tax computed at the rates applicable to the taxable year, on the basis of the taxpayer's status for the taxable year, but otherwise on the basis of the facts shown on his return for, and the law applicable to, the preceding taxable year.

77-B:21 Adjustments; Procedure. The commission is empowered to determine whether there has been error in the assessment of the tax imposed by this chapter, in accordance with the following provisions:

I. The taxpayer may demand such a determination, in writing, within three years after the tax was due or paid, whichever is later;

II. The commission may, on its own motion, undertake such a determination upon written notice to the taxpayer given within three years after the tax was due or paid, whichever is later.

III. After hearing, if requested by the taxpayer, the commission shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commission shall be assessed against the taxpayer and shall carry ten percent interest from the date originally due. Any decrease ordered by the commission shall, with ten percent interest from the date

the tax was paid, be credited against any unpaid tax then due from the taxpayer and any balance due the taxpayer shall be certified to the state treasurer who shall pay the balance to the taxpayer, but such credit and payment together may not exceed the amount of the tax originally paid, plus interest.

77-B:22 Appeal. Within thirty days after notice of any adjustment of a tax by the commission under RSA 77-B:21, a taxpayer may appeal the commission's determination by petition to the superior court in the county where the taxpayer resides or, if not a resident, in the county where he has a place of business or a resident agent. The superior court shall determine the correctness of the commission's action de novo.

Miscellaneous Provisions

77-B:23 Penalty. Whoever violates any of the provisions of this chapter shall be fined not less than one hundred dollars nor more than two thousand dollars, or imprisoned not more than one year or both.

77-B:24 Disposal of Revenue. The revenue received from this tax, after paying the expense of administrating this chapter shall be paid into the general fund.

77-B:25 Investigation, etc.

I. The commission may take the oath of any person in the course of any hearing authorized by this chapter. In connection with hearings, the commission and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts or other documents. The commission and taxpayer may take the depositions of witnesses residing within or without the state pertaining to a matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses are the same as those allowed to witnesses in the superior court and in

the case of witnesses summoned by the commission shall be considered as an expense of administration of this chapter.

II. Any notice required by this chapter to be given by the commission to a taxpayer shall be made by certified mail to the last known address of the taxpayer and in the case of hearings shall be given at least ten days before the date thereof.

77-B:26 Confidentiality of Commission Records. Notwithstanding any other provision of law and except as hereinafter provided, the records and files of the commission respecting the administration of this chapter are confidential and privileged. The commission, and any employee engaged in the administration of this chapter or charged with the custody of any such records or files, shall not disclose any information obtained from the commission's records or files or from any examination, investigation or hearing authorized by this chapter. Neither the commission nor any employee of the commission may be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceedings. The following exceptions apply to this section:

I. Testimony by a member or employee of the commission and production of records, files and information in behalf of the commission or a taxpayer in any action or proceeding under the provisions of this chapter where such testimony or the records or files or information, or the facts shown thereby are directly involved in the action or proceeding;

II. Delivery to a taxpayer or his duly authorized representative of a copy of any return or other paper filed by the taxpayer pursuant to this chapter;

III. Publication of statistics so classified as to prevent the identification of a particular return and the items of the return;

IV. Exchange of information with the United States internal revenue service in accordance with compacts made and provided for such cases;

V. Disclosure in confidence to the governor and council or their agent in the exercise of their general supervisory powers, or to any person authorized to audit the accounts of the commission in pursuance of such audit, or to the attorney general or other legal representative of the state in connection with an action or proceeding under this chapter.

77-B:27 Preference. The taxes and interest imposed by this chapter have preference in any distribution of the assets of the taxpayer, whether in insolvency or otherwise.

77-B:28 Dissolution of Corporations. No corporation organized under any law of this state may be dissolved until all taxes and interest required to be withheld by said corporation under this chapter have been fully paid. The secretary of state shall not issue a certificate of dissolution, and no decree of dissolution shall be signed in any court without a certificate from the commission that no taxes and interest imposed by this chapter are due and unpaid.

[RSA 77-B:2 effective July 1, 1970, and remainder of Chapter 77-B effective May 4, 1970]

MAINE REVISED STATUTES ANNOTATED

TITLE 36, PART 8

§ 5111. Imposition and rate of tax

A tax is hereby imposed for each taxable year on the entire taxable income of every resident individual of this State and on the taxable income of every nonresident individual which is derived from sources with-

in this State. The amount of the tax shall be determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,000	1% of the taxable income
$2,000 but not over $5,000	$20 plus 2% of excess over $2,000
$5,000 but not over $10,000	$80 plus 3% of excess over $5,000
$10,000 but not over $25,000	$230 plus 4% of excess over $10,000
$25,000 but not over $50,000	$830 plus 5% of excess over $25,000
$50,000 or more	$2,080 plus 6% of excess over $50,000

§ 5127. Credit for income tax paid to another state

1. Resident individual. A resident individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this part.

2. Limitation on credit. The credit provided under this section shall not exceed the proportion of the tax otherwise due under this part that the amount of the taxpayer's adjusted gross income derived from sources in the other taxing jurisdiction bears to his entire adjusted gross income as modified by this part.

72:1 Persons Liable. A tax of ten dollars, to be known as the "resident tax" shall be assessed on every inhabitant of the state from eighteen to sixty-five years of age whether a citizen of the United States or an alien, except paupers, insane persons, the widow of any veteran who served in the armed forces of the United States in any wars, conflicts or armed conflicts in which it has been engaged, the widow of any citizen who served in the armed forces of any country allied with the United States in any of the wars, conflicts or armed conflicts as defined in sections 28 and 32 of this chapter, and others exempt by special provisions of law. The exemption herein provided for a widow shall be available only until she remarries.

72:5a [New] Distribution of Resident Taxes. All resident taxes shall be retained for the use of town or city in which they are collected.

77:1 Rate. The annual tax upon incomes shall be levied at the rate of four and one-quarter percent. (4¼%)

77:3 Who Taxable. Taxable income is that received during the calendar year prior to the assessment of the tax by:

I. Individuals who are inhabitants or residents of this state on January first in any year, and individuals who have ceased to be residents of this state during the preceding calendar year for such part of the year as they were residents in this state.

II. Partnerships, associations and trusts, the beneficial interest in which is not represented by transferable shares, and as hereinafter provided;

III. Fiduciaries deriving their appointment from a court of this state, and as hereinafter provided.

77:4 What Taxable. Income of the following described classes is taxable:

I. Interest from bonds, notes, money at interest, and from all debts due the person to be taxed, except interest from notes or bonds of this state, deposits in any savings bank, building and loan association, or savings department of any loan and trust company or national bank in this state or in those of any state which exempts from taxation the principal or income of deposits in such institutions in this state owned by residents of that state, and notes or bonds of any political subdivision of this state issued before May 4, 1923.

II. Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state, territory, or nation, except New Hampshire state banks, trust companies, building and loan associations, or national banks.

III. Dividends, other than stock dividends paid in new stock of the partnership, association, or trust issuing the same, on shares in partnerships, associations, or trusts the beneficial interest in which is represented by transferable shares.

77:5 Exemption. Six hundred dollars of each income otherwise taxable shall be exempt.